

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Cablevision of New Jersey, Inc.)	CSB-A-0346
)	
Petition for Declaratory Ruling Regarding Local)	
Rate Order of)	
)	
Bayonne, New Jersey		
Bergen, New Jersey		

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 2003

Released: November 17, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Cablevision of New Jersey, Inc., filed a Petition for Declaratory Ruling on August 30, 1996 to determine whether Cablevision is permitted to offset undercharges for its cable programming services tier ("CPST") rates against overcharges for its basic service tier ("BST") rates. The New Jersey Division of the Ratepayer Advocate ("Advocate"), as well as, the New Jersey State Board of Public Utilities, Office of Cable Television ("OCTV") filed responses to Cablevision's Petition for Declaratory Ruling. For the reasons set forth, we deny Cablevision's Petition.

II. FACTUAL BACKGROUND AND PARTIES ARGUMENTS

2. Cablevision states that the BST and CPST rates it implemented for its Bayonne and Bergen systems on July 15, 1994, were based upon an erroneous channel count in that Cablevision mistakenly counted as a BST channel, a programming service actually carried on its CPST.¹ It asserts that thereafter on August 15, 1994, Cablevision filed its restructured BST and CPST rates for those systems and noted that due to the channel count error the rates being justified on the Form 1200 were different from the rates actually implemented.² Cablevision indicates that in Bergen, rather than implement the \$9.80 BST rate and the \$13.00 CPST, Cablevision had mistakenly implemented a basic rate of \$10.10 and a CPST rate of \$12.70, and likewise, in Bayonne Cablevision implemented a \$9.10

¹ Petition for Declaratory Ruling ("Petition") at 3. At the time Cablevision filed its petition, both BST and CPST rates were subject to regulation. Subsequently, CPST rate regulation was terminated, effective March 31, 1999. *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56. The issue raised by Cablevision is applicable to the period prior to CPST deregulation on March 31, 1999.

² *Id.*

BST rate and an \$11.45 CPST rate, instead of the correct \$8.79 basic and \$11.69 CPST rates.³ Cablevision states that the New Jersey Board of Public Utilities (“BPU”) was fully apprised of the error generating the rate discrepancies in the Form 1200.⁴ In addition, Cablevision states that it filed a Form 1210 seeking a 2.15 percent rate adjustment to take account of inflation occurring between September 30, 1993 and June 30, 1994, and calculated its BST inflation adjustment based upon the correct BST rates.⁵ Cablevision points out that the systems inadvertently implemented the inflation adjustment request prematurely, four months in advance, but that Cablevision and the New Jersey BPU entered into a stipulation designed to resolve the issues arising from the channel count error and the premature inflation adjustment.⁶

3. Cablevision states that pursuant to the stipulated agreement reviewed and approved by an administrative law judge on June 7, 1996, Cablevision would: (i) refund a sum which in both instances represents BST overcharges, plus interest, paid by the handful of Bayonne and Bergen subscribers who are basic-only customers; (ii) deposit into an escrow account a sum which represents the amount of BST overcharges, plus interest, paid by Bergen and Bayonne subscribers who are both BST and CPST subscribers, which Cablevision and the BPU agree may be susceptible to offset against the undercharges to Cablevision’s CPST subscribers as the result of the same error that generated the BST overcharges; and (iii) refund an amount equal to the revenues gained from the premature implementation of the inflation adjustment filed in November, 1994, plus interest.⁷ Cablevision indicates that its agreement with the BPU resolves all but one of the contested issues associated with the implementation of its Form 1200 basic service rates and that the only remaining issue between it and the BPU is whether Cablevision is required to refund the escrowed funds or whether such a refund is unnecessary because Cablevision is permitted to offset the amount of the BST overcharges resulting from the channel count error against CPST undercharges which were simultaneously engendered by that same error.⁸

4. Cablevision asserts that an offset should be permitted for four reasons since the BST overcharges that are the subject of the instant petition: (i) resulted solely from a channel count error; (ii) simultaneously yielded the CPST undercharges which Cablevision seeks to offset against the BST overcharge; (iii) did not result in harm to basic-only subscribers, since Cablevision agreed to pay a refund compensating for overcharges imposed upon the handful of Bergen and Bayonne systems that subscribe only to basic; and (iv) will not result in CPST subscribers paying aggregate BST/CPST rates above maximum permitted levels.⁹

5. Cablevision asserts that although the Commission has not expressly ruled that overcharges on one regulated service tier may be offset against undercharges on another regulated service tier, such a ruling is fully consistent with the principles underlying the Commission’s refund calculation

³ *Id.* at 4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 5.

⁷ *Id.* at 6.

⁸ *Id.* at 7.

⁹ *Id.* at 2.

formula.¹⁰ Cablevision states that the Commission has explained that the refund mechanism is intended to place subscribers in the same position they would be had they been subject to reasonable rates.¹¹ In addition, Cablevision asserts that in calculating overall refund liability for the BST, operators must be permitted to offset overcharges for regulated services and equipment with any undercharges in order to avoid having to refund an amount that exceeds the maximum reduction required under application of the benchmark approach.¹²

6. In further support of its position, Cablevision cites *Continental Cablevision of New England*,¹³ (“*Continental*”) where it asserts similar circumstances to the instant case were previously considered by the Commission. Cablevision states that the Commission in *Continental* noted that: (i) Continental had notified the local franchising authority of a channel count mistake three weeks before the Town rendered its rate order decision; (ii) Continental had provided the local franchising authority with timely notification of its channel count error; and (iii) the town did not dispute the accuracy of Continental’s explanation for the error, and accordingly, the Commission ruled that Continental should have been permitted an opportunity to correct its mistake by allowing Continental to file an amended Form 393.¹⁴ Cablevision states that in *Continental* the Commission concluded that the operator’s argument that a BST overcharge of \$.63 from mistakenly counting a CPST channel as a basic channel, accompanied by a corresponding CPST undercharge of \$.66 generated by the same channel count error, represented a “wash” for customers that subscribed to both BST and CPST.¹⁵ The Commission stated that operators should not be subject to refund liability due to channel count errors which do not result in BST/CPST subscribers paying aggregate BST/CPST rates that exceed the aggregate maximum permitted amount.¹⁶ Cablevision asserts that it has already agreed to refund all overcharge amounts that are not offset by a corresponding CPST undercharge, has provided the BPU with timely notice of the channel count mistake, and that requiring Cablevision to refund escrowed funds would be inconsistent with the Commission’s refund methodology.¹⁷ The Commission should allow the requested offset, since doing otherwise would penalize Cablevision for an honest mistake which did not harm subscribers and which Cablevision brought to the attention of the Board of Public Utilities.¹⁸

7. In its response, the Advocate asserts that the Commission should reject Cablevision’s request to offset overcharges in the BST with undercharges on the CPS tier and that Cablevision’s actions that resulted in overcharges on the BST were only partially attributable to an error in channel count.¹⁹

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.* at 8.

¹³ See *Continental Cablevision of New England, Inc.* 10 FCC Rcd 7569 (CSB 1995).

¹⁴ Petition at 9-10.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 11.

¹⁹ New Jersey Division of the Ratepayer Advocate Response (“Advocate Response”) at 6.

The Advocate states that Cablevision is not correct when it states that the overcharges resulted solely from a channel count error and that Cablevision acknowledges that customers were overcharged for a period of time because of errors in the timing of the implementation of certain rates.²⁰ In addition, the Advocate asserts that the facts of the case Cablevision cites for support, *Continental*, are very different in substance and timing from the instant case. The Advocate states that in *Continental* the operator alerted the franchising authority to the channel count error over three weeks before the local rate order was adopted, whereas in the instant case, Cablevision never notified the franchising authority of the channel count error, and instead the Advocate and BPU staff brought the error to Cablevision's attention, and Cablevision had already implemented its requested rates.²¹ The Advocate states that the circumstances do not warrant the same treatment.²²

8. In addition, the Advocate argues that cable operators are not required to charge the maximum permitted rate for either the BST or the CPST and that Cablevision's failure to charge the maximum that it might have been permitted to charge does not allow it to go back and retroactively demand that the CPST subscribers pay the maximum permitted rate.²³ The Advocate asserts that by denying CPST subscribers the refund resulting from overcharges on the BST that is exactly what Cablevision is attempting to do and that Cablevision is in essence trying to make a retroactive rate adjustment.²⁴ Although Cablevision states that basic-only subscribers will not be harmed by the offset since it has agreed to make a refund to basic-only subscribers, the Advocate argues that all subscribers are BST subscribers first, and CPST subscribers second, and it seeks a refund for overcharges for all ratepayers who were overcharged, not just those whose service is limited to the BST.²⁵ Moreover, the Advocate asserts that Cablevision not be permitted to retroactively charge higher rates to any customers by charging higher CPST rates by withholding a refund that would otherwise be due to subscribers.²⁶ In addition, the Advocate states that under no circumstances should a decision be made that a portion of the BST refund, which is under the BPU's jurisdiction, should be retained by Cablevision for its failure to charge the correct CPST rate.²⁷

9. The OCTV states that it takes no position on whether the Commission should allow refund offsets between tiers.²⁸ However, it requests that if refund offsets between tiers are permitted, the Commission should limit the offsets to the facts presented in Cablevision's petition and to situations where the undercharges and overcharges occurred simultaneously and solely because of a channel count

²⁰ Advocate Response at 2-3.

²¹ *Id.* at 3.

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ OCTV Response at 1.

error by the cable company.²⁹ In addition, OCTV asserts that a limited ruling would ensure that subscribers would be entitled to refunds where the offset is inapplicable or where the overcharge exceeds the undercharge.³⁰

III. DISCUSSION

10. The Commission addressed the issue of inter-tier offsets in *Cencom Cable Income Partners* (“*Cencom*”),³¹ subsequent to the filing of this Petition. In *Cencom*, the Commission explained why it does not allow such offsets: If both BST and CPST rates were within the Commission’s jurisdiction, we might have considered inter-tier offsets when ordering refunds for overcharges on CPST where less than the maximum permitted rate has been charged on the BST. However, the Communications Act set up a dual regulatory structure for cable services during the period at issue here, giving local franchising authorities jurisdiction to regulate BST and associated equipment rates, and until April 1999, giving the Commission jurisdiction to regulate CPST rates upon the filing of a valid complaint.³² While the Commission prescribed standards and procedures for local rate regulation,³³ and is authorized to consider appeals from local rate orders,³⁴ the Commission generally is not otherwise involved in local rate regulation and is not in a position to evaluate offsets between tiers as a matter of routine. Absent an appeal, the Commission may be uninformed about local matters potentially affecting BST rates. The Commission’s review of CPST rates was not coordinated with local rate review processes.³⁵ In short, allowing inter-tier offsets would have created practical problems in determining the correct BST rates for offset purposes, further burdening the administrative processes of cable rate regulation.³⁶ We see no reason to deviate from our general rule of prohibiting inter-tier offsets.

11. Moreover, although Cablevision cites *Continental* for support in its request to allow offsetting between the BST and CPST, the circumstances in the two cases are so different that separate treatment is warranted. In *Continental*, three weeks before the Town adopted its local rate order Continental notified the local franchising authority that it had mistakenly reported the number of its basic service channels on its Form 393.³⁷ The Town did not have to amend Continental’s Form 393 or request an amended Form.³⁸ Continental alerted its franchising authority before the local rate order was adopted and was permitted to revise its erroneous Form 393. The approach determined in *Continental* was reasonable under the circumstances because an error was corrected before it actually was implemented.

²⁹ OCTV Response at 2.

³⁰ *Id.*

³¹ See *Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948 (1997).

³² Communications Act § 623, 47 U.S.C. § 543.

³³ Communications Act § 623(b)(1), (3), 47 U.S.C. § 543(b)(1), (3); 47 C.F.R. §§ 76.922, 76.923.

³⁴ Communications Act § 623 (b)(5)(B), 47 U.S.C. § 543(b)(5)(B); 47 C.F. R. § 76.944.

³⁵ See *Cencom*, 12 FCC Rcd 7948, 7958.

³⁶ See *id.*

³⁷ See *Continental*, 10 FCC Rcd 7569-70 (CSB 1995).

³⁸ *Id.*

In the instant case, apparently the Advocate and the BPU staff brought the channel count error to Cablevision's attention, Cablevision thereafter notified the BPU, but by that time Cablevision had already implemented its requested rates. In addition, inflationary changes were made to the rates. The circumstances in *Continental* are not present here and Cablevision cannot expect similar treatment by being permitted to correct its form filings and offset the over and under charges.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petition for Declaratory Ruling filed by Cablevision of New Jersey, Inc. **IS DENIED** to the extent indicated herein.

13. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules. 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

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